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BANKRUPTCY OF PARTNERS. — Mr. A. Turnour Murray, in an article in the current number of "The Law Quarterly Review,"[1] suggests a new rule for the distribution in bankruptcy of the joint and separate estates of partners. His principal objections to the English rule are that "it is artificial, being founded on no intelligible principle, and is inconsistent with the principles of the law of partnership," and that "it is unfair in practice to the partnership creditors in cases where the partnership property is small and disproportionate with the separate estates." The Scotch rule, on the other hand, which applies the separate estates "to the payment *pari passu* of their respective separate debts, and of so much of the partnership debts as the partnership estate is insufficient to satisfy," Mr. Murray finds open to the opposite objection, viz., that "in practice it produces great hardship to the separate creditors;" and further, that it is based upon the principle that the firm is a distinct person, which is inconsistent with the English conception of partnership. His own rule is a mean between these two, and is said not only to be consistent with English law, but also to give the "fairest" practical results.

As for principle, his rule is based upon the theory that as far as debts are concerned partnership property is a fund set aside as a provision against loss, and that while a partnership creditor is a creditor of each of the partners, any partner who pays out of his own pocket a partnership debt is entitled to indemnity from the common fund. In bankruptcy, therefore, let the partnership creditors in the first instance come against each separate estate *pari passu* with the separate creditors. Then let the separate creditors look to the joint estate for indemnity.

Exactly stated, the rule is as follows: —

"Apply each separate estate in payment of its separate debts *pari passu* with partnership debts;

"Apply the partnership property in paying separate creditors their unpaid debts to an amount not exceeding the amount contributed to partnership debts by each respective separate estate;

"And subject thereto in paying partnership creditors their unpaid debts."

[1] Bankruptcy of Partners, 7 Law Quar. Rev. 53.

It will be seen that where the separate estates are large, and the joint estate next to nothing, the joint creditors, who would get nothing under the English rule, would receive under this rule substantial dividends. In this case the result is the same as under the Scotch rule, whereas if the partnership property is equal to the amount taken out of the separate estates for the partnership creditors, the result under Mr. Murray's rule is the same as under the English rule, thus avoiding the "injustice" to the separate creditors brought about by the Scotch rule. The suggested rule is indeed a mean between the other two. For a full and clear explanation of the operation of the three rules under different circumstances, the reader is referred to the specific examples in figures given by Mr. Murray.

What we are here concerned with, however, is the principle on which Mr. Murray's rule is based. Is it true that he has reached the bottom of the theory of partnership, when he says that the function of the joint property is to indemnify the partner who has paid a partnership debt? Or is he giving universal application to a subsidiary rule which in truth has but a restricted scope?

Let us first test his conclusions by his own hypotheses, which are as follows:

"(1.) A partnership creditor is a creditor of each of the partners.

"(2.) Partnership property is primarily applicable in payment of partnership debts.

"(3.) A partner who has paid a partnership debt is entitled to be indemnified out of the partnership property."

By (1) he allows the joint creditors to prove at once against the separate estates and receive dividends. Then by (3) the separate estates reimburse themselves from the joint estate. But the amount thus put into the separate estates is divided solely among the separate creditors. Ought it not rather to be open to the claims of the joint creditors as well? For it has now become separate estate, and by (1) all separate estate is liable for partnership debts.

This objection assumes that the separate estates are justified in taking the amount in question and denies the right to apply it solely to the separate debts. The more fundamental question is, Are the separate estates in a position to take the indemnity at all? For, assuming that they do take it, what has become of hypothesis number (2)? If "partnership property is *primarily* applicable in payment of partnership debts," how can it be taken to indemnify a partner's separate estate when the result of such taking is to leave partnership debts unpaid?[1] If the word *primarily* has any meaning, the rest of the partnership debts should be paid before the partner's claim to indemnify is thought of. Look at the absurdity of the result at this second stage of Mr. Murray's rule. There are partnership debts still unpaid; by (1) the partner's separate estate is liable for them; by (2) the partnership property is *primarily* liable for them; but both these liabilities are avoided, for by (3) the partnership property is converted into separate property and then for some unknown reason is no longer liable for partnership debts. Two funds are confessedly liable for the same debts; add the whole of one fund to the other and the

[1] We are of course discussing the case where the dividends received by the partnership creditors do not amount to payment of their debts in full.

liability disappears. Add two plus quantities together and obtain a minus quantity!

In other words, hypothesis number (3) is, as Mr. Murray applies it in the case of bankruptcy, absolutely inconsistent with numbers (1) and (2). The logical result of numbers (1) and (2) would seem to be the Scotch rule. Moreover, in obtaining this result we make no assumption that the partnership is a "distinct person." For we do not say that the firm is the debtor. We adhere to Mr. Murray's statement that the individual partners are the debtors, and we merely insist on adhering also to his second statement, namely, that certain property of these debtors is *primarily* applicable to certain debts of theirs. In short, the conception seems to be exactly analogous to the case of a creditor who has specific property of his debtor's as security; and here it is undoubted law that in bankruptcy the creditor may exhaust the whole of his security and come upon the rest of his debtor's property, *pari passu* with the other creditors, for the amount of his debt which remains unpaid. If partnership property, therefore, is primarily applicable, apply it as far as it will go, and come on the separate estate for the rest. If the estates are applied in the order indicated, the conditions of number (3) cannot arise; and, even though they are applied in the reverse order, number (3) can have no place, unless the debts have been paid in full or the partnership property is more than sufficient to pay what is left of them. If, however, the debts have been paid in full, it follows, as a matter of course, from the fact that partnership property is *primarily* liable, that whatever is left of the partnership property must go to replace that part of the separate property which was taken to pay the debts in question.

In short, number (3), in so far as it is valid as a necessary deduction from numbers (1) and (2), gives no support whatever to Mr. Murray's rule; while, as applied in Mr. Murray's rule, it is inconsistent with numbers (1) and (2).

Having apparently arrived at the Scotch rule, let us consider Mr. Murray's objections to it. He says that it unduly favors partnership creditors and produces great hardship to the separate creditors. We admit that in many cases the result of the Scotch rule is that partnership creditors receive large dividends, while separate creditors receive exceedingly small ones. But what more natural than that A, who confessedly has a claim against two funds, should be in a better position than B, who has a claim on but one of them? It is of course just that A should be compelled to exhaust his own fund before competing with B; but beyond this A's claim against the separate estate is as good as B's, and we fail to see any "unfairness" in letting him enforce it on equal terms with B. The English rule seems to be founded on a misunderstanding of this principle of marshalling. A, though only partially satisfied out of the partnership property, is deprived altogether of his right against the separate property, until B is wholly satisfied. The injustice of such a rule is apparent, and is it not also apparent that anything short of the Scotch rule is equally indefensible?

Mr. Murray, however, urges, as a further objection to the Scotch rule, that it necessitates the assumption that a partnership is a "distinct person," and that this theory is irreconcilable with English law. Of course the Scotch rule is one of the necessary consequences of the assumption alluded to; but, if our deductions have been correct, it is also a necessary conse-

quence of Mr. Murray's own hypotheses, which he states as "three leading principles in the English law of partnership." This last objection, therefore, falls to the ground.

In the foregoing discussion, we have assumed the correctness of Mr. Murray's hypotheses as the most conclusive way of showing the incorrectness of his rule. The hypotheses themselves, however, we are by no means disposed to admit. The "mercantile theory," so far from being "clearly opposed to the principles of the English law of partnership," is the real basis of many of the English decisions; and, though by no means openly recognized or universally applied, it is, we venture to think, the only theory on which it is possible to work out completely and satisfactorily the law of partnership.

This general theory we have not the space to discuss; suffice it, therefore, to point out its application to the case in hand. A partnership creditor, instead of being as in number (1) above the creditor of each of the partners, is the creditor of the firm, and has no direct claim of any kind upon the separate estates of the partners. The partners, however, are liable to the firm for any deficiencies in the firm assets. This contingent liability of the partners to the firm is in fact one of the assets of the firm. The other assets of the firm are of course first applied to the firm debts. Then, in regard to the amount of firm debts which remain unsatisfied, the firm creditors must work out their rights, not directly against the separate estates of the partners, but through their debtor, the firm. For the amount of this deficiency, the firm is the creditor of each of the individual partners, and is entitled to prove against the separate estates on an equal footing with other separate creditors.

This is in substance the view put forth by Mr. Cory in his Treatise on Mercantile Accounts.[1] Mr. Murray sees fit to characterize it as "the operation of an accountant who is ignorant of the principles which govern the law of partnership," and as a system which "entirely breaks down and produces unjust results when the partners are insolvent." We have tried to show, however, in regard to this last point, not only that this system produces just results, but, further, that Mr. Murray's own principles, when properly applied, produce exactly similar results.

F. C. H.

Mayor Matthews, of Boston, makes the interesting recommendation in his inaugural address that the whole expense of laying out new streets be charged in future upon the abutting owners. He suggests various arguments to show the expediency of this plan; but its constitutionality seems open to grave doubt. Can it be said to be a "proportional and reasonable" tax within the Constitution of Massachusetts to lay the whole burden upon the abutters without any regard to the benefit conferred upon the public at large? In *Dorgan* v. *Boston*, 12 All. 223, where the constitutionality of local assessments for improvements was upheld, the court observed that it would be plainly unconstitutional to designate a certain class of persons on whom to impose a tax, "having no regard to the share of public charges which each ought to pay relatively to that borne by all others." In *State* v. *Newark*, 37 N. J. Law, 415, a statute

[1] See the passage cited by Lord Justice Lindley in his Treatise on Partnership (1888), p. 696.

requiring abutters to pay two-thirds of the cost of paving a street was held unconstitutional, though it left the other third to come from the public, as disregarding the principle that local assessments must be based solely on benefit to the person assessed.[1] And in Pennsylvania also, though the Constitution contained no express restraint on the taxing power, a similar statute was held unconstitutional in *Hammett* v. *Philadelphia*, 65 Pa. 146, on the ground that it was inconsistent with the idea of equality necessarily involved in the conception of a tax. The reasoning of these cases would seem to apply *a fortiori* to Mayor Matthews's project.

CAN a State forbid aliens to sell liquor? The Court of Appeals of Maryland has held in *Trageser* v. *Gray*, 20 Atl. Rep. 905, that it can; but the decision can be supported only by putting the liquor traffic on peculiar ground. It would scarcely be asserted that a State could, under the Fourteenth Amendment, enact that no alien should carry on the trade of a butcher or baker; and *Yick Wo* v. *Hopkins*, 118 U. S. 356,[2] shows plainly enough that a similar restriction on the laundry business is unconstitutional. Why, then, is it valid in the liquor trade? The reasoning in *Trageser* v. *Gray* is something as follows: A State can prohibit the sale of liquor altogether, and therefore no man, alien or citizen, has a "natural right" to sell it. This right to prohibit necessarily includes the right to regulate; and into the reasonableness of the regulation the court cannot inquire. The Fourteenth Amendment does not compel an "equal distribution of favors," because that amendment imposed no restraints on the police power of the States. "We are unable," says the court, "to conceive that any one, citizen or alien, can acquire rights which could in any way control, impair, impede, limit, or diminish the police power of a State. Such power is original, inherent, and exclusive. It has never been surrendered to the general government, and never can be surrendered, without imperilling the existence of civil society."

This treatment of the police power indicates the fallacy which, it is respectfully submitted, underlies the decision in *Trageser* v. *Gray*. The court says that no one can acquire rights which in any way limit the police power of a State; yet by the Thirteenth Amendment several million slaves acquired rights destructive of the institution which was a generation ago the typical illustration of the police power. And so the Fourteenth Amendment, though of course leaving with the States the power to regulate their internal affairs, and so the great mass of legislative powers included in the term "police power," provided that in the exercise of this or any other power no person should be deprived of the equal protection of the laws. The Legislature may prohibit the liquor trade, *i. e.*, make a lawful trade unlawful; otherwise it remains lawful, subject, like other lawful trades, to regulation by the State. But whatever else the State may accomplish by this regulation, it must stop short of withholding the equal protection of the laws; and when the fact that a man is an alien is made a ground for excluding him from a trade open to others, this clause of the Fourteenth Amendment seems to apply with the same force

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[1] The court added that it would be otherwise in the case of a sidewalk, where the abutter could probably be charged with the sole expense of maintaining it; but the reason for this was distinctly stated to be the difference between the sidewalk and the rest of the street.

[2] See 4 Harv. L. Rev. 236.

whatever be the nature of the trade. It is not that an alien has an inherent right to sell liquor, but that he has a right not to be debarred merely because he is an alien. Would the Maryland Court of Appeals, in view of the history of the Fourteenth Amendment, support a statute forbidding any negro to sell liquor?

In *Trageser* v. *Gray* the provision in question was only one clause of a statute raising the license fee and imposing on the liquor trade other restrictions not unlike those in *Crowley* v. *Christensen*, 11 Sup. Ct. Rep. 13,[1] and plainly constitutional. As the plaintiff undertook to treat the whole statute as invalid, and demanded a license under the provisions of the statute previously in force, the *decision* of the case may be supported consistently with the views here suggested; and it is noticeable that two members of the court, including the Chief Justice, while concurring in the judgment, state that their reasons are not those of the majority. If the Supreme Court of the United States has occasion to pass upon the constitutionality of the alien clause, it may be seriously doubted whether the decision of the Maryland court will be sustained.

THE Incorporated Council of Law Reporting for England and Wales has decided to begin a new series of reports. The change is entirely unnecessary and has caused a good deal of grumbling in England, as the advantages of it are not very apparent and it necessitates a new method of citation. It was hard enough before to avoid confusing 1 Q. B., L. R. 1 Q. B., and 1 Q. B. D., but we must now add [1891] 1 Q. B. The citations for the new series will be as follows:

Chancery Division	[1891] 1 Ch.
	[1891] 2 Ch.
	[1891] 3 Ch.
Queen's Bench Division	[1891] 1 Q. B.
	[1891] 2 Q. B.
Probate Division	[1891] P.
Appeal Cases	[1891] A. C.
In 1892 they will be	[1892] 1 Ch., etc.

RECENT CASES.

[These cases are selected from the current English and American decisions not yet regularly reported, for the purpose of giving the latest and most progressive work of the courts. No pains are spared in selecting *all* the cases, comparatively few in number, which disclose the general progress and tendencies of the law. When such cases are particularly suggestive, comments and references are added, if practicable.]

ADMIRALTY — JOINT TORT-FEASORS. — Where vessel A. has been injured by the negligent management of vessels B. and C., the admiralty rule as to damages is the same as the common-law rule; the entire damage may be recovered from either one, if the plaintiff chooses. The American rule, that in the first instance only half can be recovered from either one, and, in addition, the balance only, which the plaintiff cannot enforce against either, being recoverable from the other, does not hold in England. *The Avon* [1891], P. 7 (Eng.).

ADMIRALTY — MARITIME LIEN. — The plaintiff agreed to remain on board ship while it was at the dock. *Held*, he had a maritime lien for wages so earned. *Reg.* v. *Judge of City of London Court*, 63 L. T. Rep. N. S. 492 (Eng.).

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[1] See 4 Harv. L. Rev. 236.